IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FORTUNATO MARTINO	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
vs.	**:**	**NO. 06-3913**
	:	
WOLFF SHOES, MARMI and PAMELA DEFEO	**:**	
	:	
Defendants.	**:**	

ORDER & MEMORANDUM

ORDER

AND NOW, this 5th day of March, 2007, upon consideration of the Motion For Summary Judgment of Defendant, Wolff Shoe Company d/b/a Marmi and Partial Motion For Summary Judgment of Defendant Pamela DeFeo (Doc. No. 7, filed December 13, 2006); the Supplemental Motion for Summary Judgment of Defendant, Wolff Shoe Company d/b/a Marmi and Partial Motion For Summary Judgment of Defendant Pamela DeFeo (Doc. No. 9, filed January 3, 2007); Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment and Plaintiff's Motion to Stay (Doc. No. 10, filed January 26, 2007); and the Brief in Support of Summary Judgment (Doc. No. 11, filed February 7, 2007), **IT IS ORDERED** as follows:

1. Plaintiff's Motion to Stay is **GRANTED**;

2. The Motion For Summary Judgment of Defendant, Wolff Shoe Company d/b/a Marmi, and Partial Motion For Summary Judgment of Defendant Pamela DeFeo are **DENIED WITHOUT PREJUDICE** to defendants' right to resubmit the motions or file amended motions after the stay is vacated; and

3. The Supplemental Motion for Summary Judgment of Defendant, Wolff Shoe

Company d/b/a Marmi, and Partial Motion For Summary Judgment of Defendant Pamela DeFeo are **DENIED WITHOUT PREJUDICE** to defendants' right to resubmit the motions or file amended motions after the stay is vacated.

MEMORANDUM

I. INTRODUCTION

Plaintiff alleges violations of the Family and Medical Leave Act ("FMLA") and intentional infliction of emotional distress ("IIED") arising out of actions taken by his employer, defendant Wolff Shoe Company d/b/a Marmi ("Marmi"), and his manager, defendant Pamela DeFeo ("DeFeo"). (Compl. at ¶¶ 8-36.) Presently before the Court are defendants' motions for summary judgment and plaintiff's Motion to Stay. For the reasons set forth below, the Court grants plaintiff's motion to stay, and denies defendants' motions for summary judgment without prejudice to defendants' right to resubmit the motions or file amended motions after the Court vacates the stay.

II. PROCEDURAL HISTORY

Plaintiff commenced this action pursuant to interstate commerce jurisdiction under 28 U.S.C. § 1337, with a federal cause of action arising out of § 107(a)(2) of the FMLA, 29 U.S.C.A. § 2601, *et seq*. (Compl. at ¶ 6.) The Court notes that FMLA actions are typically commenced pursuant to federal question jurisdiction under 28 U.S.C. 1331, rather than interstate commerce jurisdiction under U.S.C. § 1337.[1] See, e.g., Peter v. Lincoln Technical Institute, Inc., 255 F. Supp. 2d 417, 424 (E.D. Pa. 2002); Keeshan v. Home Depot, U.S.A., Inc., 2001 WL

[1] The interstate commerce jurisdiction statute "is important when the Act of Congress does not have its own jurisdiction conferring provision . . . [but] adds nothing to one that does." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

310601, *17 (E.D. Pa. March 27, 2001).

Although the pleadings do not state explicitly the jurisdictional basis for plaintiff's IIED claim, the Court determines that plaintiff brings this Pennsylvania state law claim under the doctrine of supplemental jurisdiction.[2] 28 U.S.C. § 1367; see Kramer v. Kubicka, 2006 WL 1644825, *3 (D.N.J. June 9, 2006); County of Delaware v. Government Systems, Inc., 230 F. Supp. 2d 592, 595 (E.D. Pa. 2002) ("The pleadings of both parties suggest . . . that federal court jurisdiction . . . could arise only under the doctrine of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.")

On December 13, 2006, defendants filed a motion for summary judgment arguing that plaintiff is ineligible to assert a federal cause of action under the FMLA. (Def. Mot. at 4.) Defendants also argue that the Pennsylvania Worker's Compensation Act, 77 P.S. § 1, *et seq.*, bars plaintiff's IIED claim. (Id. at 6.) On January 9, 2006, defendants filed a supplement motion for summary judgment arguing, *inter alia*, that the Court should not exercise supplemental jurisdiction over plaintiff's IIED claim because plaintiff has no cognizable federal claim. (Def. Supp. Mot. at 4.)

On January 26, 2007, plaintiff filed a motion to stay this action. Plaintiff has administrative claims pending under the Americans with Disabilities Act ("ADA"), and requests that this action be stayed pending the issuance of a Notice of Right to Sue from the Equal Opportunity Employment Counsel ("EEOC"). (Pl. Opp. at 5-6.) Although plaintiff requested an early Notice of Right to Sue from the EEOC, it appears that a Notice cannot be issued before May 10, 2007, at the earliest. (Id.)

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[2] Plaintiff does not allege diversity jurisdiction under 28 U.S.C. § 1332. (Compl. at ¶ 6.)

III. DISCUSSION

Plaintiff argues that a stay is necessary to prevent claim preclusion of plaintiff's ADA claim, and is judicially efficient because plaintiff's FMLA claim, ADA claim, and IIED claim could be adjudicated together in this Court. (Pl. Resp. at 6.) The Court agrees, and grants plaintiff's Motion to Stay. Consequently, the Court denies defendants' motions for summary judgment without prejudice; defendants may resubmit the motions or file amended motions after the Court vacates the stay.

A. Legal Standard

"The purpose of claim preclusion is to avoid piecemeal litigation of claims arising from the same events." Churchill v. Star Enterprises, 183 F.3d 184, 194 (3d. Cir. 1999). Application of claim preclusion "requires a showing . . . that there has been (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same causes of action." United States v. Athlone Industries, Inc., 746 F.2d 977, 983 (3d Cir. 1984).

In the context of FMLA and ADA claims, the Third Circuit has stated that a motion to stay is an appropriate means to ameliorate claim preclusion problems created by a delay in a right to sue letter:

> [T]he district court correctly . . . held that Churchill could have requested the court to stay [the FMLA claim] while she waited for the right to sue letter, and by that procedural step preserved the PHRA and ADA claims now precluded. Churchill points out that the court [that presided over the FMLA claim] was aware of her pending administrative claims, and asserts that the court improperly and unfairly put the responsibility of promoting the ideas of claim preclusion and judicial economy solely on her back. We reject that argument summarily. Attorneys should organize litigation that they are pursuing to avoid claim preclusion.

Churchill, 183 F.3d at 192.

B. Analysis

To determine whether a stay is appropriate in this case, the Court examines whether ruling on plaintiff's FMLA claim would preclude plaintiff's ADA claim. As neither party disputes that the ADA claim would involve the same parties as the FMLA claim, the Court must examine the remaining two prongs of the claim preclusion standard. Applying that test, the Court concludes that claim preclusion would apply if the Court were to enter a final judgment on the FMLA claim because the facts underlying both claims are the same. Thus, the Court grants plaintiff's Motion to Stay. In light of the potentially lengthy stay in this case, the Court denies defendants' motions for summary judgment without prejudice, and grants leave to defendants to resubmit the motions or file amended motions after the Court vacates the stay.

1. Final Judgment on the Merits

Summary judgment constitutes a final judgment on the merits of a claim, as does dismissal with prejudice for failure to state a claim. Hubicki v. ACF Industries, Inc., 484 F.2d 519, 524 (3d Cir. 1973) (summary judgment); Carpenter v. Ashby, 2007 WL 437847, *3 (E.D. Pa. Jan. 25, 2007) (dismissal with prejudice for failure to state a claim); cf. Kean v. Adler, 65 Fed. App'x 408, 415, 2003 WL 21205885, *6 (3d Cir. May 23, 2003) (dismissals without prejudice that "are mere procedural rulings" are "not final judgments on the merits"). On the other hand, "the dismissal of a complaint for lack of jurisdiction does not adjudicate the merit[s] so as to make the case res judicata on the substance of the asserted claim . . . ." Boone v. Kurtz 617 F.2d 435, 436 (5th Cir. 1980); see Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances,723 F.2d 357, 360 (3d Cir. 1983) (citing Fed. R. Civ. P. 41(b)).

In the motions for summary judgment, defendants argue that plaintiff is ineligible to

assert a federal cause of action under the FMLA because Marmi employs less than fifty employees within seventy-five miles of plaintiff's work site.[3] (Def. Mot. at 5.) Assuming *arguendo* that this is correct, a dismissal could not be based on lack of subject matter jurisdiction, and thus would constitute an adjudication on the merits.

Although the Third Circuit has not yet articulated whether the FMLA's fifty-employee threshhold is jurisdictional or substantive, it has held that "while the matter is not free from doubt, the fifteen-employee threshold is a substantive element . . . of a Title VII claim and is not jurisdictional." Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 78 (3d Cir. 2003). In Carr v. Borough of Elizabeth, 121 Fed. App'x 459 (3d Cir. 2005), the Third Circuit extended Nesbit by holding that the ADEA's twenty-employee threshold was also substantive and not jurisdictional. Id. at 460 (noting that "Title VII and the ADEA are similar in structure and purpose" and criticizing the district court for not discussing Nesbit). In the FMLA context, the Sixth Circuit recently held that the FMLA's fifty-employee threshold is indeed substantive. Cobb v. Contract Transport, Inc., 452 F.3d 543, 549-550 (6th Cir. 2006). But see Hukill v. Auto Care, Inc., 192 F.3d 437, 441 (4th Cir. 1999) (holding that the FMLA's fifty-employee threshold is jurisdictional).

Applying the Third Circuit's decision in Nesbit, and Cobb, in which the Sixth Circuit ruled that the FMLA's 50-employee threshold was substantive, the Court determines that it cannot grant summary judgment or dismiss plaintiff's claim for lack of subject matter

[3] The FMLA excludes from the definition of "eligible employee" anyone who is "employed at a work site at which the employer employs less than fifty employees if the total number of employees employed by the employer within seventy-five mile of that work site is less than fifty." 29 U.S.C. § 2611(2)(B)(ii).

jurisdiction. To the contrary, granting summary judgment or dismissing plaintiff's FMLA claim would constitute a final judgment on the merits of the claim for purposes of claim preclusion.

2. Identical Cause of Action

"Whether two lawsuits are based on the identical cause of action 'turn[s] on the essential similarity of the underlying events giving rise to the various legal claims.'" Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc., 983 F.2d 495, 504 (3d Cir. 1992) (citing Athlone Industries, 746 F.2d at 983). In Churchill, the Third Circuit held that

> the district court properly concluded that the case involved the same cause of action because the underlying events in both cases are the same, as the acts complained of were the same, and the evidence at the trial would have been the same. *While Churchill cited different statutes to support her two cases, the FMLA in Churchill I and the ADA and PHRA in Churchill II, the court correctly observed that the fact that Churchill advanced different legal theories does not mean that her second action will not be precluded.*

183 F.3d at 195 (emphasis added and quotations omitted). The Third Circuit proceeded to determine that the FMLA claim and the subsequent ADA claim were indeed based on the same cause of action. Id.

In this case, plaintiff's FMLA and ADA claims share the same underlying facts: actions taken by Marmi regarding the health of plaintiff and his son. Therefore, the Court concludes that plaintiff's FMLA and ADA claims are based on the same cause of action for purposes of claim preclusion.

IV. CONCLUSION

For the foregoing reasons, plaintiff's Motion to Stay is granted, and defendants' motions for summary judgment are denied without prejudice.

BY THE COURT:

/s/ Honorable Jan E. DuBois

JAN E. DUBOIS, J.